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7 **BOARD OF EQUALIZATION**
8 **STATE OF CALIFORNIA**

9
10 In the Matter of the Appeals of:

) **HEARING SUMMARY**

) **PERSONAL INCOME TAX APPEALS**

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12
13 **RICK BURNINGHAM;**

) **Case No. 469765 (RICK BURNINGHAM)**

14 **ARTURO CUEVA;**

) **Case No. 487046 (ARTURO CUEVA)**

15 **KARL EISENHAMMER;**

) **Case No. 476721 (KARL EISENHAMMER)**

16 **RANDOLPH FRODSHAM;**

) **Case No. 474115 (RANDOLPH FRODSHAM)**

17 **CAROL GRANT;**

) **Case No. 487068 (CAROL GRANT)**

18 **RICHARD GRANT;**

) **Case No. 487065 (RICHARD GRANT)**

19 **CHRISTOPHER GYORGY;**

) **Case No. 476765 (CHRISTOPHER GYORGY)**

20 **DEMERIS PARKS;**

) **Case Nos. 482907, 476896 (DEMERIS PARKS)**

21 **DAN PICKELL;**

) **Case Nos. 477221, 487503, 488194, 488195,
488196 (DAN PICKELL)**

22 **JINTAU TWO;**

) **Case No. 480043 (JINTAU TWO)**

23 **ANTHONY WIEST**

) **Case No. 482498 (ANTHONY WIEST)**

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Appeals of Rick Burningham, et al.

NOT TO BE CITED AS PRECEDENT - Document prepared for Board review. It does not represent the Board's decision or opinion.

1 Representing the Parties:

2 For Appellants: Peymon Mottahedeh

3 For Franchise Tax Board: Rachel Abston, Legal Analyst; Janet Butler, Legal Analyst;
4 Mark McEvelly, Tax Counsel III; Jane Perez, Tax Counsel;
5 Suzanne L. Small, Tax Counsel III; Mary Yee, Tax
Counsel

6 CONSOLIDATED APPEALS¹

7 These consolidated appeals are made pursuant to section 19045, of the Revenue and
8 Taxation Code (R&TC) from the actions of the Franchise Tax Board (FTB or respondent) on each
9 appellant’s protest of the respective proposed assessment set forth in the exhibits below.

- 10
- 11 QUESTIONS: (1) Whether an appellant has demonstrated error in his or her respective tax
12 assessment(s).
- 13 (2) If a notice and demand penalty (demand penalty) and/or a late filing penalty was
14 imposed by the FTB in a particular appeal, whether there is reasonable cause for
15 the appellant’s failure to file upon the FTB’s demand and/or failure to file a
16 timely return.
- 17 (3) If a filing enforcement fee was imposed by the FTB in a particular appeal,
18 whether we can grant relief from the filing enforcement fee.
- 19 (4) Whether the Board has jurisdiction to consider any post-amnesty penalties.
- 20 (5) Whether the Board should impose a frivolous appeal penalty (or penalties) on a
21 particular appellant.

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25 ¹ The following appeals were originally set for oral hearing on February 23, 2010: Rick Burningham, 469765; Arturo Cueva,
26 487046; Karl Eisenhammer, 476721; Randolph Frodsham, 474115; Christopher Gyorgy, 476765; Demeris Parks, 482907;
27 Dan Pickell, 477221; Dan Pickell, 488194; Dan Pickell 488195; Dan Pickell, 488196. However, based on Board staff’s belief
28 that appellant's representative desired to waive the appearances (based on discussions with him), the appeals were
rescheduled as nonappearance items for February 23, 2010. Later, appellant’s representative clarified that hearings were
desired and they were therefore removed from the February 23, 2010 nonappearance calendar and placed on the Board’s oral
hearing calendar for June 2010.

1 HEARING SUMMARY

2 Background

3 The facts for each appellant are set forth in the respective exhibit(s), which are attached at
4 the end of this Hearing Summary.

5 Contentions

6 Appellants

7 Each appellant sets forth the following contentions in his/her respective appeal:

- 8 • The FTB's assessment is arbitrary and baseless;
- 9 • Appellant was denied a protest hearing;
- 10 • A protest hearing was not provided because the FTB did not produce the evidence
11 it considered against appellant, and appellant was not given an opportunity to test,
12 explain, or refute such evidence; and
- 13 • The FTB violated the Information Practices Act (IPA) (Cal. Civ. Code, §§ 1798 et
14 seq.).

15 The FTB

16 In each respective appeal, the FTB contends that the appellant should not prevail because
17 the appellant failed to meet his/her burden of proof in demonstrating any error in the FTB proposed
18 assessment. The FTB also disputes each individual contention. In response to the claim that an
19 appellant was denied a protest hearing, the FTB contends that it was the appellant's failure to appear that
20 resulted in appellant not presenting his/her arguments at the protest hearing for the matter. The FTB
21 also rejects appellant's claim that the proposed assessment is arbitrary and without factual foundation.
22 The FTB asserts that its use of information from various sources to estimate appellant's taxable income,
23 when appellant failed to file his/her own return, is a reasonable and rational method of estimating
24 taxable income. The FTB also rejects the claim that it violated the IPA by withholding documents from
25 the appellant, and the FTB asserts that the IPA does not apply to a determination of tax liability under
26 the Personal Income Tax Law. In addition, the FTB asserts that the Board has an established policy of
27 declining to decide constitutional/due process issues.

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1 Next, the FTB contends that the late filing penalty and/or the demand penalty (if assessed
2 by the FTB in a particular case) were properly imposed and the appellant has not presented evidence of
3 reasonable cause to support abatement of those penalties. In addition, the FTB asserts that in each case
4 where the FTB assessed a filing enforcement fee, there is no language in the statutes that will excuse the
5 filing enforcement fee. Also, the FTB argues that this Board does not have jurisdiction to consider post-
6 amnesty penalties.

7 Finally, the FTB contends that each appellant is maintaining a frivolous appeal, and the
8 FTB requests the Board impose a frivolous appeal penalty on each appellant.

9 Applicable Law

10 Proposed Assessment(s)

11 R&TC section 17041 imposes a tax “. . . upon the entire taxable income of every resident
12 of this state . . .” and upon the entire taxable income of every nonresident or part-year resident which is
13 derived from sources in this state.² R&TC section 18501 requires every individual subject to the
14 Personal Income Tax to make and file a return with the FTB “stating specifically the items of the
15 individual’s gross income from all sources and the deductions and credits allowable” R&TC
16 section 19087, subdivision (a), provides:

17 If any taxpayer fails to file a return, or files a false or fraudulent return
18 with intent to evade the tax, for any taxable year, the Franchise Tax
19 Board, at any time, may require a return or an amended return under
20 penalties of perjury or may make an estimate of the net income, from
any available information, and may propose to assess the amount of
tax, interest, and penalties due.

21 In *Palmer v. Internal Revenue Service* (9th Cir. 1997) 116 F.3d 1309, 1313, the court
22 stated that when a taxpayer fails to report any income, the FTB may reconstruct the taxpayer’s income
23 based on statistics and the “evidentiary foundation necessary for the presumption of correctness to
24 attach is minimal.”

25 If the FTB makes a tax assessment based on an estimate of income, the FTB’s initial
26 burden is to show why its assessment is reasonable and rational. (*Todd v. McColgan* (1949) 89
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28 ² It appears undisputed that each appellant resided in California during the respective tax year(s).

1 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.)³ Federal courts have
2 held that the taxing agency need only introduce some evidence linking the taxpayer with the unreported
3 income. (See *Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932.) The FTB's use of information from
4 various sources to estimate an appellant's taxable income, when the appellant failed to file his/her own
5 return, is a reasonable and rational method of estimating taxable income. (See *Palmer v. Internal*
6 *Revenue Service, supra*; *Andrews v. Commissioner*, T.C. Memo 1998-316; *Giddio v. Commissioner*,
7 (1970) 54 T.C. 1530, 1533; *Appeals of Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992; *Appeals of R. and*
8 *Sonja J. Tonsberg*, 85-SBE-034, Apr. 9, 1985.)

9 Once the FTB has met its initial burden, the assessment is presumed correct and appellant
10 has the burden of proving it to be wrong. (*Todd v. McColgan, supra*; *Appeal of Michael E. Myers,*
11 *supra*.) Unsupported assertions are not sufficient to satisfy appellant's burden of proof. (*Appeal of*
12 *Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of uncontradicted, credible,
13 competent, and relevant evidence showing error in the FTB's determinations, they must be upheld.
14 (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.) An appellant's failure to
15 produce evidence that is within his/her control gives rise to a presumption that such evidence is
16 unfavorable to his/her case. (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.)

17 Information Practices Act

18 IPA arguments are not within the Board's jurisdiction. In the *Appeals of Fred R.*
19 *Dauberger, et al.*, (82-SBE-082), decided on March 31, 1982, this Board stated that "the only power that
20 this Board has is to determine the correct amount of an appellant's California personal income tax
21 liability for the appeal years." The above-quoted language was a direct response to similar arguments
22 raised by each appellant. (See also *Appeals of Robert E. Wesley, et al.*, 2005-SBE-002, Nov. 15, 2005.)

23 In *Bates v. Franchise Tax Board* (2004) 124 Cal.App.4th 367, the court discussed
24 whether alleged IPA violations could be used to defeat a proposed tax assessment. The *Bates* court held
25 that the R&TC provisions governing the estimation of income for persons who do not file tax returns,
26 and the related provisions for the assessment and collection of taxes, are not superseded by the IPA.

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28 ³ Board of Equalization cases are generally available for viewing on the Board's website (www.boe.ca.gov).

1 (See also *Appeals of Robert E. Wesley, et al., supra.*)

2 Constitutional/Due Process Issues

3 The Board is precluded from determining the constitutional validity of California statutes,
4 and has an established policy of declining to consider constitutional issues. (Cal. Const., art III, § 3.5;
5 *Appeal of Aimor Corp.*, 83-SBE-221, Oct. 26, 1983; *Appeals of Walter R. Bailey, supra.*) In *Bailey*,
6 *supra*, the Board stated:

7 [D]ue process is satisfied with respect to tax matters so long as an opportunity
8 is given to question the validity of a tax at some stage of the proceedings. It
9 has long been held that more summary proceedings are permitted in the field
of taxation because taxes are the lifeblood of government and their prompt
collection is critical.

10 Late Filing Penalties

11 California imposes a penalty for the failure to file a return on or before the due date,
12 unless it is shown that the failure is due to reasonable cause and not due to willful neglect. (Rev. & Tax.
13 Code, § 19131.) To establish reasonable cause, the taxpayer “must show that the failure to file timely
14 returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as
15 would prompt an ordinary intelligent and prudent businessman to have so acted under similar
16 circumstances.” (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.)

17 Demand Penalties

18 California imposes a penalty for the failure to file a return or provide information upon
19 the FTB’s demand to do so, unless reasonable cause prevented the taxpayer from responding to the
20 request. (Rev. & Tax. Code, § 19133.) The burden is on the taxpayer to prove that reasonable cause
21 prevented him/her from responding to the demand. (*Appeal of Kerry and Cheryl James*, 83-SBE-009,
22 Jan. 3, 1983.) The FTB will only impose a demand penalty if the taxpayer fails to respond to a current
23 Demand for Tax Return and the FTB issued an NPA under the authority of R&TC section 19087,
24 subdivision (a), after the taxpayer failed to timely respond to a Request for Tax Return or a Demand for
25 Tax Return at any time during the four-taxable-years preceding the year for which the current Demand
26 for Tax Return is being issued. (Cal. Code Regs., tit. 18, § 19133, subd. (b).)⁴

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28 ⁴ Regulation 19133 became operative on December 23, 2004.

1 Filing Enforcement Fees

2 R&TC section 19254 authorizes imposition of a filing enforcement fee when the FTB
3 mailed notice to a taxpayer that the continued failure to file a return may result in imposition of the fee.
4 Once the fee is properly imposed, there is no language in the statute that would excuse the fee under any
5 circumstances, including for reasonable cause. (See *Appeal of Michael E. Myers, supra.*)

6 Amnesty Penalties

7 In 2004, the Legislature enacted the income tax amnesty program. (Rev. & Tax. Code,
8 §§ 19730-19738.) Eligible taxpayers could participate by filing an amnesty application and paying their
9 outstanding liabilities of tax and interest, or entering into an installment plan, during the period of
10 February 1, 2005, through March 31, 2005, inclusive. (Rev. & Tax. Code, §§ 19730 & 19731.) For
11 liabilities that remained outstanding after the last day of the amnesty period, a penalty was imposed
12 equal to 50 percent of the accrued interest payable. (Rev. & Tax. Code, § 19777.5, subd. (a).)

13 The Board's jurisdiction to review the amnesty penalty is extremely limited. For
14 example, a taxpayer has no right to an administrative protest or appeal of an unpaid amnesty penalty.
15 (*Id.* subd. (d).) A taxpayer also has no right to file an administrative claim for refund of a paid amnesty
16 penalty, except upon the basis that the penalty was not properly computed. (*Id.* subd. (e).) Therefore,
17 the Board's jurisdiction to review the amnesty penalty is limited to situations where the penalty is
18 assessed and paid, the taxpayer files a timely appeal from a denial of a refund claim, and the taxpayer
19 attempts to show a computational error in the penalty.

20 Frivolous Appeal Penalties

21 The Board may impose a penalty of up to \$5,000 whenever it appears to the Board that
22 proceedings before it have been instituted or maintained primarily for delay or that the position is
23 frivolous or groundless. (Rev. & Tax. Code, § 19714; Cal. Code Regs., tit., 18, § 5454.) The following
24 factors are considered in determining whether, and in what amount, to impose the penalty: (1) whether
25 appellant is making arguments that have been previously rejected by this Board in a Formal Opinion or
26 by courts, (2) whether appellant is repeating arguments that he or she made in prior appeals, (3) whether
27 appellant filed the appeal with the intent of delaying legitimate tax proceedings or the legitimate
28 collection of tax owed, and (4) whether appellant has a history of filing frivolous appeals or failing to

1 comply with California's tax laws. (Cal. Code Regs. title 18, § 5454.) This Board may consider other
2 relevant factors in addition to the factors listed above. (*Id.*)

3 Each appellant was notified that the Board may impose a frivolous appeal penalty in the
4 respective Notice of Action (NOA) that was issued to the appellant and in a letter from Board staff.

5 STAFF COMMENTS

6 The parties should be prepared to discuss whether each assessment was reasonable and
7 rational and whether the appellant has demonstrated a basis for the abatement of penalties and/or fees.

8 If a demand penalty was assessed in a particular case, the FTB should be prepared to
9 show that the taxpayer failed to timely respond to a Request for Tax Return or a Demand for Tax Return
10 during the four-taxable-years preceding the year for which the current Demand for Tax Return was
11 issued, and that FTB subsequently issued an NPA for that preceding year. (Cal. Code Regs., tit. 18,
12 § 19133, subd. (b).)⁵ Appeals Division staff (staff) notes that it is not clear from the appeal record
13 whether these requirements were met in the following appeals: Karl Eisenhammer, Randolph Frodsham,
14 Demeris Parks, and Anthony Wiest.

15 Pursuant to California Code of Regulations, title 18, section 5523.6, if an appellant wants
16 to provide additional evidence to the Board, the appellant should submit his/her additional evidence to
17 Board Proceedings at least 14 days prior to the oral hearing.⁶ Staff notes that any determination by the
18 Board should take into account the following FTB concessions:

- 19 • Dan Pickell, Case No. 488194: ***On appeal, the FTB agrees to delete the demand***
20 ***penalty and the filing enforcement fee.***
- 21 • Dan Pickell, Case No. 488195: ***On appeal, the FTB agrees to delete the demand***
22 ***penalty and the filing enforcement fee.***
- 23 • Dan Pickell, Case No. 488196: ***On appeal, the FTB agrees to delete the demand***
24 ***penalty and the filing enforcement fee.***
- 25 • Jintau Two, Case No. 480043: ***On appeal, the FTB agrees to (i) reduce the tax from***
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27 ⁵ As noted above, regulation 19133 became operative on December 23, 2004.

28 ⁶ Evidence exhibits should be sent to: Claudia Madrigal, Appeals Analyst, Board Proceedings Division, State Board of
Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.

1 *\$12,762.00 to 11,386.00, (ii) reduce the late filing penalty from \$3,190.50 to*
2 *\$2,846.50, and (iii) reduce the demand penalty from \$3,190.50 to \$2,846.50.*

3 Based on the facts and circumstances, including the frivolous nature of the arguments
4 presented by each appellant and the appeal and compliance history of each appellant (as set forth in the
5 exhibits), staff suggests that the parties may wish to discuss whether the imposition of frivolous appeal
6 penalties in the following amounts would be appropriate:

- 7 • **Rick Burningham, Case No. 469765, penalty \$5,000**
- 8 • **Arturo Cueva, Case No. 487046, penalty \$5,000**
- 9 • **Karl Eisenhammer, Case No. 476721, penalty \$2,500**
- 10 • **Randolph Frodsham, Case No. 474115, penalty \$750**
- 11 • **Carol Grant, Case No. 487068, penalty \$5,000**
- 12 • **Richard Grant, Case No. 487065, penalty \$5,000**
- 13 • **Christopher Gyorgy, Case No. 476765, penalty \$5,000**
- 14 • **Demeris Parks, Case No. 482907, penalty \$375**
- 15 • **Demeris Parks, Case No. 476896, penalty \$375**
- 16 • **Dan Pickell, Case No. 477221, penalty \$500**
- 17 • **Dan Pickell, Case No. 487503, penalty \$500**
- 18 • **Dan Pickell, Case No. 488194, penalty \$500**
- 19 • **Dan Pickell, Case No. 488195, penalty \$500**
- 20 • **Dan Pickell, Case No. 488196, penalty \$500**
- 21 • **Jintau Two, Case No. 480043, penalty \$5,000**
- 22 • **Anthony Wiest, Case No. 482498, penalty \$750**

23 Attachments: Exhibits 1-16.

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27 Burningham, et al._wjs

Exhibit 1 - Rick Burningham, Case No. 469765

Assessment: A proposed assessment in the amount of \$2,655.00 in tax, a \$663.75 late filing penalty, a \$1,202.75 demand penalty, and a \$122.00 filing enforcement fee for 2006.

Facts: Appellant has not filed a 2006 California income tax return. Having received information from reporting sources that appellant received sufficient income to trigger the filing requirement,⁷ the FTB issued a notice demanding that appellant file a return or explain why no return was required. When appellant neither filed a return nor demonstrated why a return was not required, the FTB issued a Notice of Proposed Assessment (NPA) on April 1, 2008. Appellant timely protested the NPA but failed to attend the August 19, 2008 protest hearing conducted by the FTB. The FTB later affirmed its assessment in an NOA issued on September 17, 2008. Appellant then filed this timely appeal.

Filing History: This is appellant's fifth appeal of this nature. Appellant's first appeal (for 2002, case no. 303817) was voluntarily dismissed by appellant; in his second appeal (for 2003, case no. 330830), the Board found against appellant and imposed a frivolous appeal penalty of \$2,500. He then filed a petition for rehearing, which was denied on August 14, 2007. In his third appeal (for 2004, case no. 395921), the Board found against appellant and imposed a frivolous appeal penalty of \$5,000. He then filed a petition for rehearing, which was denied on September 16, 2008. In his fourth appeal (for 2005, case no. 449292), the Board found against appellant and imposed a frivolous appeal penalty of \$5,000. According to the FTB, appellant has not filed a valid California income tax return since the 2001 tax year. Demand penalties were imposed for tax years 2003-2005.

⁷ For 2006, appellant's estimated income of \$79,049 is based on information from reporting sources, which showed that appellant received \$53,918 in wages from Cupertino Electric Inc.; \$21,099 in wages from Mer-Cal Electric, Inc.; \$16 in dividends from Fidelity Cash Reserves; \$16 in dividends from Exxon Mobil Corporation; and \$4,000 in income from National Financial Services LLC.

Exhibit 2 – Arturo Cueva, Case No. 487046

Assessment: A proposed assessment in the amount of \$1,329.00 in tax, a \$332.25 late filing penalty, a \$332.25 demand penalty, and a \$119.00 filing enforcement fee for 2006.

Facts: Appellant has not filed a 2006 California income tax return. Having received information from the Employment Development Department (EDD) that appellant received sufficient income to trigger the filing requirement,⁸ the FTB issued a notice demanding that appellant file a return or explain why no return was required. When appellant neither filed a return nor demonstrated why a return was not required, the FTB issued an NPA on September 2, 2008. Appellant timely protested the NPA but failed to attend the March 5, 2009 protest hearing conducted by the FTB. The FTB later affirmed its assessment in an NOA issued on March 25, 2009. Appellant then filed this timely appeal.

Filing History: This is appellant’s third appeal of this nature; in his first appeal (for 2002, case no. 315933), the Board found against appellant and imposed a frivolous appeal penalty of \$750; in his second appeal (for 2004, case no. 384279), the Board found against appellant and imposed a frivolous appeal penalty of \$2,500. He then filed a petition for rehearing, which was denied. According to the FTB, appellant has not filed a valid California income tax return since the 2000 tax year. A demand penalty was imposed for 2004.

⁸ For 2006, appellant’s estimated income of \$40,716 is based on EDD records, which show that appellant received \$40,716 in wages from Able Air Corporation.

Exhibit 3 – Karl Eisenhammer, Case No. 476721

Assessment: A proposed assessment in the amount of \$4,978.00 in tax, a \$1,244.50 late filing penalty, a \$1,845.25 demand penalty, and a \$122.00 filing enforcement fee for 2006.

Facts: Appellant has not filed a 2006 California income tax return. Having received information from the EDD that appellant received sufficient income to trigger the filing requirement,⁹ the FTB issued a notice demanding that appellant file a return or explain why no return was required. When appellant neither filed a return nor demonstrated why a return was not required, the FTB issued an NPA on April 1, 2008, based on the EDD wage information. Appellant timely protested the NPA but failed to attend the November 3, 2008 protest hearing conducted by the FTB. The FTB later affirmed its assessment in an NOA issued on November 18, 2008. Appellant then filed this timely appeal.

Filing History: This is appellant's second appeal of this nature; in his first appeal (for 2005, case no. 429657), the Board found against appellant and imposed a frivolous appeal penalty of \$750 on February 25, 2009. Appellant filed a petition for rehearing, which was denied by the Board on July 21, 2009. In the first appeal (for 2005), the FTB did *not* impose a demand penalty.

In its Opening Brief, the FTB gives appellant's filing history as follows:

Appellant did not file a 2003 return. However, respondent did not pursue action in this matter as appellant's income was below the threshold amount in 2003 . . . For tax year 2004, respondent issued a Request for Tax Return based on EDD records. Appellant subsequently filed a delinquent 2004 return on May 15, 2006.

In addition to the matter presently before your Board [for 2006, case 476721], respondent issued filing enforcement NPA's for the 2005 and 2007 tax years. With respect to the 2005 tax year, appellant appealed to your Board from respondent's actions for 2005 (Case ID No. 429657). An oral hearing was scheduled Appellant waived his appearance The NPA for the 2007 tax year is pending.

⁹ For 2006, appellant's estimated income of \$106,640.00 is based on EDD records, which showed that appellant received \$106,640.44 in wages in 2006 from Endress and Hauser Conducta Inc. (formerly Wedgewood Analytical Inc.). The difference of \$0.44 is insignificant for purposes of this appeal.

Exhibit 4 – Randolph Frodsham, Case No. 474115

Assessment: A proposed assessment in the amount of \$2,774.00 in tax, a \$693.50 late filing penalty, a \$693.50 demand penalty, and a \$122.00 filing enforcement fee for 2006.

Facts: Appellant has not filed a 2006 California income tax return. Having received information from various sources that appellant received sufficient income to trigger the filing requirement,¹⁰ the FTB issued a notice demanding that appellant file a return or explain why no return was required. When appellant neither filed a return nor demonstrated why a return was not required, the FTB issued an NPA on April 1, 2008. Appellant timely protested the NPA but failed to attend the October 1, 2008 protest hearing conducted by the FTB. The FTB later affirmed its assessment in an NOA issued on October 15, 2008. Appellant then filed this timely appeal.

Filing History: This is appellant’s first appeal of this nature. In its Opening Brief, the FTB states that from 1994-2007 (excluding tax year 2003), the FTB issued filing enforcement NPAs, all of which became final except for 2005, which was protested but not appealed, and 2007 which the FTB states is still pending.

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

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¹⁰ For 2006, appellant’s estimated income of \$57,078 is based on federal Form 1099s, which show that appellant received \$38,982 in income from Home Loans Network Inc; \$16,321 in income from Temecula Valley Real Estate Inc Keller W; \$1,775 in income from Wells Fargo Bank N.A.

Exhibit 5 – Carol Grant, Case No. 487068

Assessment: A proposed assessment in the amount of \$1,681.00 in tax, a \$420.25 late filing penalty, a \$420.25 demand penalty, and a \$119.00 filing enforcement fee for 2006.

Facts: Appellant has not filed a 2006 California income tax return. Through its Integrated Non-Filer Compliance Program, the FTB discovered from the Physical Therapy Board of California that appellant held a physical therapist license in 2006.¹¹ The FTB issued a notice demanding that appellant file a return or explain why no return was required. Appellant requested and was granted additional time to reply to the notice. When appellant neither filed a return nor demonstrated why a return was not required, the FTB issued an NPA on September 2, 2008. Appellant timely protested the NPA but failed to attend the February 26, 2009 protest hearing conducted by the FTB. The FTB later affirmed its assessment in an NOA issued on March 11, 2009. Appellant then filed this timely appeal.

Filing History: This is appellant's fourth appeal of this nature; in her first appeal (for 2003, case no. 328920), the Board found against appellant and imposed a frivolous appeal penalty of \$750; in her second appeal (for 2004, case no. 383405), the Board found against appellant and imposed a frivolous appeal penalty of \$1,000; in her third appeal (for 2005, case no. 429678), the Board found against appellant and imposed a frivolous appeal penalty of \$5,000. In each prior appeal, appellant filed a petition for rehearing, which was denied. According to the FTB, appellant has not filed a valid California income tax return since the 1999 tax year. Demand penalties were imposed for the tax years 2003-2005.

¹¹ For the 2006 tax year, the FTB estimated appellant's income to be \$45,109, based on the average income amount of other individuals in appellant's line of work.

Exhibit 6 – Richard Grant, Case No. 487065

Assessment: A proposed assessment in the amount of \$5,881.00 in tax, a \$1,470.25 late filing penalty, a \$1,470.25 demand penalty, and a \$119.00 filing enforcement fee for 2006.

Facts: Appellant has not filed a 2006 California income tax return. Through its Integrated Non-Filer Compliance Program, the FTB obtained computer information from Washington Mutual Bank, F.A. (Washington Mutual) reporting that appellant paid mortgage interest in 2006 in the amount of \$29,026, which indicated income sufficient to trigger the filing requirement.¹² The FTB issued a notice demanding that appellant file a return or explain why no return was required. When appellant neither filed a return nor demonstrated why a return was not required, the FTB issued an NPA on September 15, 2008, based on the information received from Washington Mutual. Appellant timely protested the NPA but failed to attend the February 19, 2009 protest hearing conducted by the FTB. The FTB later affirmed its assessment in an NOA issued on March 11, 2009. Appellant then filed this timely appeal.

Filing History: This is appellant's fourth appeal of this nature; in his first appeal (for 2003, case no. 335775), the Board found against appellant and imposed a frivolous appeal penalty of \$750; in his second appeal (for 2004, case no. 381468), the Board found against appellant and imposed a frivolous appeal penalty of \$1,500; in his third appeal (for 2005, case no. 429665), the Board found against appellant and imposed a frivolous appeal penalty of \$5,000. In the prior appeals, appellant filed petitions for rehearings, which were denied. According to the FTB, appellant has not filed a valid California income tax return since the 1999 tax year. Demand penalties were imposed for the tax years 2003-2005.

¹² For the 2006 tax year, the FTB estimated appellant's income to be \$87,078 by multiplying the amount of mortgage interest paid by four ($\$29,026 \times 4 = \$116,104$), less a deduction of \$29,026 "because mortgage interest is an allowable deduction." The multiplication of the mortgage interest by four is an industry standard, which represents the minimum amount of income an individual would need to qualify for the mortgage. We note that Exhibit A of the FTB's Opening Brief is difficult to read, but it seems to show that the mortgage interest paid was actually \$29,025 (not \$29,026). The parties may want to clarify this at the oral hearing.

1 Exhibit 7 – Christopher Gyorgy, Case No. 476765

2 Assessment: A proposed assessment in the amount of \$10,554.00 in tax, a \$2,638.50 late
3 filing penalty, a \$3,547.00 demand penalty, and a \$122.00 filing enforcement fee for 2005.

4 Facts: Appellant has not filed a 2005 California income tax return. Having received
5 information from various sources that appellant received sufficient income to trigger the filing
6 requirement,¹³ the FTB issued a notice demanding that appellant file a return or explain why no return
7 was required. When appellant neither filed a return nor demonstrated why a return was not required, the
8 FTB issued an NPA on August 27, 2007. Appellant timely protested the NPA but failed to attend the
9 November 3, 2008 protest hearing conducted by the FTB. The FTB later affirmed its assessment in an
10 NOA issued on November 18, 2008. Appellant then filed this timely appeal.

11 Filing History: This is appellant’s third appeal of this nature; in his first appeal (for 2001,
12 case no. 282946), the Board found against appellant and imposed a frivolous appeal penalty of \$750; in
13 his second appeal (for 2003, case no. 427533), the Board found against appellant and imposed a
14 frivolous appeal penalty of \$2,500. In each prior appeal, appellant filed a petition for rehearing, which
15 was denied. According to the FTB, appellant has not filed a valid California income tax return since the
16 2000 tax year. A demand penalty was imposed for the 2003 tax year.

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

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27 ¹³ For 2005, appellant’s estimated income of \$177,681 is based on EDD records and federal Form 1099s, which show that
28 appellant received \$145,456 in wages from Young and Rubicam, Inc.; \$31,570 in wages from David and Goliath LLC; \$314
in interest from Merrill Lynch Pierce Fenner & Smith Inc.; \$55 in interest from Patelco Credit Union; dividends of \$148 from
Prudential Financial, Inc.; and dividends of \$138 from Computershare Trust Company, Inc.

1 Exhibit 8 – Demeris Parks, Case No. 482907

2 Assessment: A proposed assessment in the amount of \$3,760 in tax, a \$940 late filing
3 penalty, a \$940 demand penalty, and a \$119 filing enforcement fee for 2006.

4 Facts: Appellant has not filed a 2006 California income tax return. Having received
5 information from various reporting sources that appellant received sufficient income to trigger the filing
6 requirement,¹⁴ the FTB issued a notice demanding that appellant file a return or explain why no return
7 was required. When appellant neither filed a return nor demonstrated why a return was not required, the
8 FTB issued an NPA on September 2, 2008. Appellant timely protested the NPA but failed to attend the
9 January 7, 2009 protest hearing conducted by the FTB. The FTB later affirmed its assessment in an
10 NOA issued on January 28, 2009. Appellant then filed this timely appeal.

11 Filing History: Demeris Parks submitted two appeals in this Board hearing. If combined,
12 this will represent the first time appellant presented an appeal of this nature to the Board. According to
13 the FTB, it has no record of appellant ever filing a valid California income tax return. In its Opening
14 Brief, the FTB states that it “issued a Demand for Tax Returns (sic) and filing enforcement NPA’s
15 against appellant for the 2001, 2004, 2005, and 2007 tax years.”
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27 ¹⁴ For 2006, appellant’s estimated income of \$67,759 is based on income reported on a federal Form 1099-MISC, which
28 showed that appellant received income of \$67,759 from the Kern County Office of Education (which is also referred to by
the FTB as “Kern County Supt of Schools” in various documents provided on appeal).

Exhibit 9 – Demeris Parks, Case No. 476896

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2 Assessment: A proposed assessment in the amount of \$3,445.00 in tax, a \$861.25 late
3 filing penalty, and a \$861.25 demand penalty for 2004.

4 Facts: Appellant has not filed a 2004 California income tax return. Having received
5 information from various reporting sources that appellant received sufficient income to trigger the filing
6 requirement,¹⁵ the FTB issued a notice demanding that appellant file a return or explain why no return
7 was required. When appellant neither filed a return nor demonstrated why a return was not required, the
8 FTB issued an NPA on July 14, 2008. Appellant timely protested the NPA but failed to attend the
9 November 3, 2008 protest hearing conducted by the FTB. The FTB later affirmed its assessment in an
10 NOA issued on November 18, 2008. Appellant then filed this timely appeal.

11 Filing History: Demeris Parks submitted two appeals in this Board hearing. If combined,
12 this will represent the first time appellant presented an appeal of this nature to the Board. According to
13 the FTB, it has no record of appellant ever filing a valid California income tax return. In its Opening
14 Brief, the FTB states that it issued NPA's to appellant for the 2001, 2005, 2006, and 2007 tax years.
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¹⁵ For 2004, appellant's estimated income of \$62,321 is based on the following 2004 reported income: \$61,110 from the Kern
County Office of Education and \$1,200 from Pacific Auction Exchange, Inc.

Exhibit 10 – Dan Pickell, Case No. 477221

Assessment: A proposed assessment in the amount of \$9,745.00¹⁶ in additional tax, a \$2,436.25 late filing penalty, and a proposed post-amnesty penalty of \$590.44 for 2002.

Facts: Appellant has not filed a 2002 California income tax return. Having received information from various sources that appellant received sufficient income to trigger the filing requirement,¹⁷ the FTB issued a notice dated January 20, 2004, requesting that appellant file a return or explain why no return was required. When appellant neither filed a return nor demonstrated why a return was not required, the FTB issued an NPA (original NPA) on April 19, 2004. Appellant did not timely protest the original NPA and, therefore, it became final. Later, the FTB learned that the Internal Revenue Service (IRS) adjusted appellant's 2002 federal return to reflect total income of \$172,124. On January 16, 2008, the FTB issued an NPA that conformed to the federal adjustment. Appellant timely protested the NPA but failed to attend the August 11, 2008 protest hearing conducted by the FTB. The FTB later affirmed its assessment in an NOA issued on December 1, 2008. Appellant then filed this timely appeal.

Filing History: Dan Pickell submitted five appeals in this Board hearing. If combined, this will represent the second time appellant presented appeals of this nature to the Board. In his first appeal (for 2005, case no. 429756, appeal file opened on December 12, 2007), the Board found against appellant and imposed a frivolous appeal penalty of \$750 on April 28, 2009. Appellant then filed a petition for rehearing, which was denied on September 22, 2009. As noted above, appellant filed five additional appeals, which are now being considered at this Board hearing. According to the FTB, it has no record of appellant ever filing a California tax return.

¹⁶ The FTB's Opening Brief incorrectly lists the amount of additional tax as "\$14751.44."

¹⁷ For 2002, the FTB's original estimate of appellant's income (i.e., \$60,600) was based on a federal Form 1099, which shows that appellant received income of \$60,600 from Silva Bodas & Co. Inc. As discussed below, the FTB later revised appellant's 2002 income to \$172,124.

Exhibit 11 – Dan Pickell, Case No. 487503

Assessment: A proposed assessment in the amount of \$5,434.00 in additional tax, a \$1,358.50 late filing penalty, a \$1,358.50 demand penalty, and a \$119.00 filing enforcement fee for 2006.

Facts: Appellant has not filed a 2006 California income tax return. Through its Integrated Non-Filer Compliance Program, the FTB discovered from the Contractors State Licensing Board that in 2006 appellant was a licensed heating, ventilation, and air-conditioning (HVAC) contractor in and around Pacifica, California.¹⁸ The FTB issued a notice demanding that appellant file a return or explain why no return was required. When appellant neither filed a return nor demonstrated why a return was not required, the FTB issued an NPA on September 2, 2008. Appellant timely protested the NPA but failed to attend the protest hearing conducted by the FTB. The FTB later affirmed its assessment in an NOA issued on March 25, 2009. Appellant then filed this timely appeal.

Filing History: Dan Pickell submitted five appeals in this Board hearing. If combined, this will represent the second time appellant presented appeals of this nature to the Board. In his first appeal (for 2005, case no. 429756, appeal file opened on December 12, 2007), the Board found against appellant and imposed a frivolous appeal penalty of \$750 on April 28, 2009. Appellant then filed a petition for rehearing, which was denied on September 22, 2009. As noted above, appellant filed five additional appeals, which are now being considered at this Board hearing. According to the FTB, it has no record of appellant ever filing a California tax return. A demand penalty was imposed for the 2005 tax year.

¹⁸ For the 2006 tax year, the FTB estimated appellant's income to be \$85,719, based on the fact that in 2006 appellant was a licensed HVAC contractor and the average income amount of other individuals in appellant's line of work.

1 Exhibit 12 – Dan Pickell, Case No. 488194

2 Assessment: A proposed assessment in the amount of \$11,438.00 in additional tax, a
3 \$2,859.50 late filing penalty, a \$3,141.00 demand penalty, a \$1,928.57 proposed post-amnesty penalty,
4 and a \$122.00 filing enforcement fee for 2000. ***On appeal, the FTB agrees to delete the demand***
5 ***penalty and the filing enforcement fee.***

6 Facts: Appellant has not filed a 2000 California income tax return. Having received
7 information from the IRS that appellant received sufficient income to trigger the filing requirement,¹⁹
8 the FTB issued a notice requesting that appellant file a return or explain why no return was required.
9 When appellant neither filed a return nor demonstrated why a return was not required, the FTB issued an
10 NPA on January 16, 2008. Appellant timely protested the NPA but failed to attend the August 11, 2008
11 protest hearing conducted by the FTB. The FTB later affirmed its assessment in an NOA issued on
12 December 1, 2008. Appellant then filed this timely appeal.

13 Filing History: Dan Pickell submitted five appeals in this Board hearing. If combined,
14 this will represent the second time appellant presented appeals of this nature to the Board. In his first
15 appeal (for 2005, case no. 429756, appeal file opened on December 12, 2007), the Board found against
16 appellant and imposed a frivolous appeal penalty of \$750 on April 28, 2009. Appellant then filed a
17 petition for rehearing, which was denied on September 22, 2009. As noted above, appellant filed five
18 additional appeals, which are now being considered at this Board hearing. According to the FTB, it has
19 no record of appellant ever filing a California tax return.

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¹⁹ The FTB's estimate of appellant's income (i.e., \$162,159) is based on IRS information, showing that appellant received income of \$162,159 in 2000.

1 Exhibit 13 – Dan Pickell, Case No. 488195

2 Assessment: A proposed assessment in the amount of \$13,496.00 in additional tax, a
3 \$3,374.00 late filing penalty, a \$3,374.00 demand penalty, a \$1,410.30 proposed post-amnesty penalty,
4 and a \$122.00 filing enforcement fee for 2001. ***On appeal, the FTB agreed to delete the demand***
5 ***penalty and the filing enforcement fee.***

6 Facts: Appellant has not filed a 2001 California income tax return. Having received
7 information from the IRS that appellant received sufficient income to trigger the filing requirement,²⁰
8 the FTB issued a notice requesting that appellant file a return or explain why no return was required.
9 When appellant neither filed a return nor demonstrated why a return was not required, the FTB issued an
10 NPA on January 16, 2008. Appellant timely protested the NPA but failed to attend the August 11, 2008
11 protest hearing conducted by the FTB. The FTB later affirmed its assessment in an NOA issued on
12 December 1, 2008. Appellant then filed this timely appeal.

13 Filing History: Dan Pickell submitted five appeals in this Board hearing. If combined,
14 this will represent the second time appellant presented appeals of this nature to the Board. In his first
15 appeal (for 2005, case no. 429756, appeal file opened on December 12, 2007), the Board found against
16 appellant and imposed a frivolous appeal penalty of \$750 on April 28, 2009. Appellant then filed a
17 petition for rehearing, which was denied on September 22, 2009. As noted above, appellant filed five
18 additional appeals, which are now being considered at this Board hearing. According to the FTB, it has
19 no record of appellant ever filing a California tax return.

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28 ²⁰ The FTB's estimate of appellant's income (i.e., \$175,274) is based on IRS information, showing that appellant received
income of \$175,274 in 2001.

1 Exhibit 14 – Dan Pickell, Case No. 488196

2 Assessment: A proposed assessment in the amount of \$12,849.00 in additional tax, a
3 \$3,212.25 late filing penalty, a \$3,212.25 demand penalty, and a \$122.00 filing enforcement fee for
4 2003. *On appeal, the FTB agreed to delete the demand penalty and the filing enforcement fee.*

5 Facts: Appellant has not filed a 2003 California income tax return. Having received
6 information from the IRS that appellant received sufficient income to trigger the filing requirement,²¹
7 the FTB issued a notice requesting that appellant file a return or explain why no return was required.
8 When appellant neither filed a return nor demonstrated why a return was not required, the FTB issued an
9 NPA on January 16, 2008. Appellant timely protested the NPA but failed to attend the August 11, 2008
10 protest hearing conducted by the FTB. The FTB later affirmed its assessment in an NOA issued on
11 December 1, 2008. Appellant then filed this timely appeal.

12 Filing History: Dan Pickell submitted five appeals in this Board hearing. If combined,
13 this will represent the second time appellant presented appeals of this nature to the Board. In his first
14 appeal (for 2005, case no. 429756, appeal file opened on December 12, 2007), the Board found against
15 appellant and imposed a frivolous appeal penalty of \$750 on April 28, 2009. Appellant then filed a
16 petition for rehearing, which was denied on September 22, 2009. As noted above, appellant filed five
17 additional appeals, which are now being considered at this Board hearing. According to the FTB, it has
18 no record of appellant ever filing a California tax return.

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²¹ The FTB's estimate of appellant's income (i.e., \$169,679) is based on IRS information, showing that appellant received income of \$169,679 in 2003.

Exhibit 15 – Jintau Two, Case No. 480043

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2 Assessment: A proposed assessment in the amount of \$12,762.00 in tax, a \$3,190.50 late
3 filing penalty, a \$3,190.50 demand penalty, and a \$122.00 filing enforcement fee for 2006. ***On appeal,***
4 ***the FTB agrees to (i) reduce the tax from \$12,762.00 to 11,386.00, (ii) reduce the late filing penalty***
5 ***from \$3,190.50 to \$2,846.50, and (iii) reduce the demand penalty from \$3,190.50 to \$2,846.50.***

6 Facts: Appellant has not filed a 2006 California income tax return. Through its
7 Integrated Non-Filer Compliance Program, the FTB discovered that (1) appellant had income from
8 various sources in 2006, and (2) the California State Board of Optometry listed appellant as a licensed
9 California optometrist in 2006.²² The FTB issued a notice demanding that appellant file a return or
10 explain why no return was required. When appellant neither filed a return nor demonstrated why a
11 return was not required, the FTB issued an NPA on April 1, 2008. Appellant timely protested the NPA
12 but failed to attend the November 19, 2008 protest hearing conducted by the FTB. The FTB later
13 affirmed its assessment in an NOA issued on December 26, 2008. Appellant then filed this timely
14 appeal.

15 Filing History: This is appellant's third appeal of this nature; in his first appeal (for 2004,
16 case no. 377464), the Board found against appellant and imposed a frivolous appeal penalty of \$750.
17 Appellant filed a petition for rehearing, which was denied. In his second appeal (for 2005, case no.
18 445969), the Board found against appellant and imposed a frivolous appeal penalty of \$2,500.
19 According to the FTB, appellant has not filed a valid California income tax return since the 2002 tax
20 year. Demand penalties were imposed for the 2004 and 2005 tax years.

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26 ²² For 2006, the FTB originally estimated that appellant's income was \$160,790 based on the following: (1) \$149,710 based
27 on the fact that appellant was a licensed optometrist and the average income amount of other individuals in appellant's line of
28 work; (2) \$10,395 based on a Form 1099-MISC from Medical Eye Services; and (3) \$4,014 based on a Form 1099-MISC
from Blue Shield of California Life & Health. On appeal, the FTB now concedes that it will disregard the amounts set forth
in items 2-3 because the amounts may duplicate income amounts already accounted for in the calculated average business
income of optometrists. Accordingly, the FTB now estimates that appellant's income was \$149,710 in 2006. The FTB made
this finding based on its own assessment of the facts and not based on any analysis of appellant.

Exhibit 16 – Anthony Wiest, Case No. 482498

Assessment: A proposed assessment in the amount of \$9,433 in tax, a \$2,358.25 late filing penalty, a \$2,358.25 demand penalty, and a \$119.00 filing enforcement fee for 2006.

Facts: Appellant has not filed a 2006 California income tax return. Having received information from reporting sources that appellant received sufficient income to trigger the filing requirement,²³ the FTB issued a notice demanding that appellant file a return or explain why no return was required. When appellant neither filed a return nor demonstrated why a return was not required, the FTB issued an NPA on September 2, 2008. Appellant timely protested the NPA but failed to attend the January 7, 2009 protest hearing conducted by the FTB. The FTB later affirmed its assessment in an NOA issued on January 28, 2009. Appellant then filed this timely appeal.

Filing History: This is appellant's first appeal of this nature. According to the FTB, appellant has not filed a California income tax return since the 1999 tax year. In its Opening Brief, the FTB states as follows:

Besides the assessment on appeal in this matter, respondent has issued NPAs for tax years 2000, 2003, 2004, and 2007. The NPA for tax year 2000 was appealed to your Board (Case No. 253080) which was dismissed by your Board, the assessment became final and the assessment has been fully paid. The NPA's issued for the 2003 and 2004 tax years are final and fully paid. The NPA for the 2007 tax year has been protested, and the protest is pending."

²³ For 2006, the FTB states that appellant's income of \$126,149.17 "was calculated by using the gross sales reported from appellant's Board of Equalization sales tax return (\$259,780.00) multiplied by the average gross profit percentage for appellant's type of business (retail book stores)."